Report on

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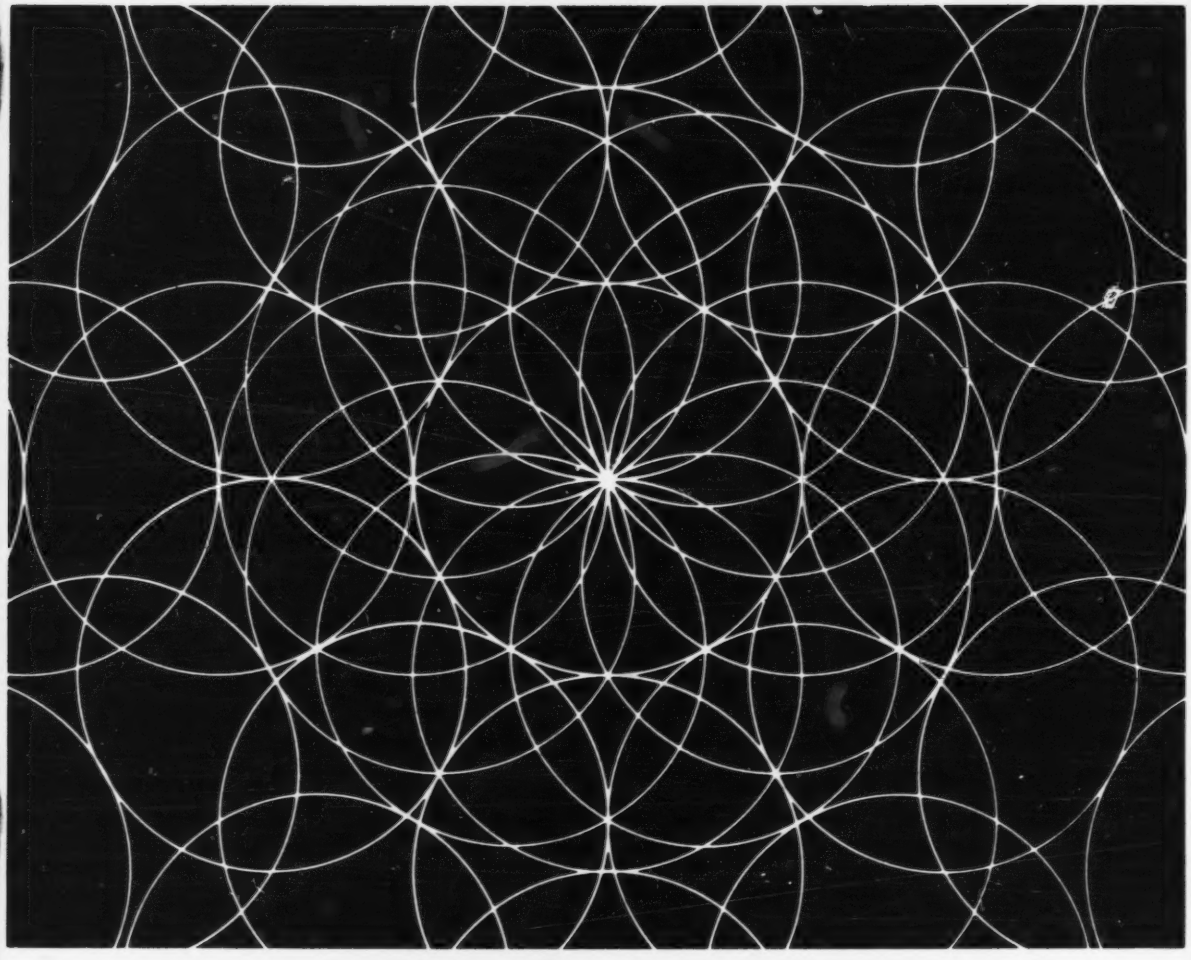
Report on Certificates of Lis Pendens



MANITOBA
LAW REFORM COMMISSION

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COMMISSION DE RÉFORME DU DROIT

REPORT ON CERTIFICATES OF LIS PENDENS

February 1, 1983

Report #54

The Manitoba Law Reform Commission was established by "*The Law Reform Commission Act*" in 1970 and began functioning in 1971.

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CHAPTER 1

INTRODUCTION

1.01 The subject of this Report concerns the reform and improvement of the law pertaining to certificates of lis pendens. The Commission agreed to consider this topic following a request from a practising member of the legal profession. The Commission was asked specifically to study whether a statutory cause of action should be introduced to allow the recovery of damages where a certificate of lis pendens has been filed without a reasonable claim to title or interest in land. This issue is addressed in this Report in addition to other matters pertaining to the scope and form of these certificates, and their relationship to the Torrens system of land registration.

1.02 It is common practice for the Commission to consult with members of the public and Bar who may wish to comment on a matter we are studying before we report our final recommendations to the Attorney-General. As the subject of certificates of lis pendens is of particular concern to practising lawyers, we requested and received helpful submissions from several members of the Bar as to whether damages should be recoverable where a certificate has been "wrongfully" filed, and on the reform of certificates of lis pendens generally. We wish to record our gratitude to these respondents.

1.03 The format of this Report is as follows. In Chapter 2 we summarize briefly the history and the current law governing certificates of lis pendens and make recommendations regarding their appropriate scope and form. The issue as to whether a statutory cause of action should be created for the "wrongful" filing of a certificate is examined separately in the succeeding chapter. Our recommendations for reform are summarized in Chapter 4 and two draft Bills to implement them are contained in Appendices A and B.

CHAPTER 2

THE SCOPE AND FORM OF CERTIFICATES OF LIS PENDENS

A. Introduction

2.01 A certificate of lis pendens is distinguishable from a lis pendens itself. The phrase "lis pendens" means simply what its component words indicate: "law suit pending". A certificate of lis pendens is slightly more complex; it is a document issued by a court certifying that a lawsuit has been commenced in which some title or interest in land is called in question. Upon its registration in a land titles office, the effect of a certificate of lis pendens is to give notice to all the world that the property against which the certificate is filed is the subject of a lawsuit. Its purpose therefore is to notify prospective purchasers and encumbrancers that any interest acquired by them in land to which a certificate is filed is subject to any decree or judgment which may issue from that suit.[1]

2.02 Historically, it was the doctrine of Equity that the pendency of a lawsuit itself created constructive notice for all the world without any further notification required.[2] The basis for this doctrine was that the commencement of a lawsuit "is a transaction in a sovereign court of justice [and] it is supposed that all people are attentive to what passes there . . . ".[3] The Parliament in England intervened in 1839 by generally providing that no lis pendens was binding upon a purchaser or mortgagee without express notice unless a memorandum, similar to a certificate, was filed with the Court of Common Pleas.[4]

2.03 When Manitoba became a province in 1870, the Legislature did not expressly enact this English legislation. However, in 1889, four years after it adopted the Torrens system of title registration, the Legislature enacted the predecessor to subsection 148(2) of "The Real Property Act".[5] That subsection now reads as follows:

148(2) A person claiming an estate or interest in land, or in a mortgage or encumbrance subject to, or under, the new system, may, in lieu of or after filing a caveat, proceed by way of statement of claim, and may file with the district registrar a certificate of lis pendens or other proper evidence of the proceedings.

2.04 Forty-two years later, in 1931, the Legislature enacted what are now sections 87 and 88 of "The Queen's Bench Act", C.C.S.M. c. C280.[6] Section 87 reads as follows (see para. 3.13 ff. for discussion of section 88):

87(1) The institution of an action or the taking of a proceeding, in which any title to or interest in land is brought in question, shall not be deemed notice of the action or proceeding to any person not a party to it, until a certificate, signed by the proper officer, has been registered in the land titles office of the land titles district in which the land is situated.

87(2) The certificate may be in the following form:

> I certify that in an action or proceeding in the Court of Queen's Bench between A.B., of , and C.D., of , some title or interest is called in question in the following land (describing it).
> Dated at (stating date and place).

87(3) Subsection (1) does not apply to an action or proceeding for foreclosure or sale upon a registered mortgage.

2.05 As stated in subsection 87(1), a certificate of lis pendens may issue from the Court of Queen's Bench whenever "any title to or interest in land is brought in question". The certificate may be issued where an action is instituted by statement of claim or where proceedings are initiated by originating notice of motion (see Queen's Bench Rule 513(1)). In practice, the prothonotary or one of his deputies will issue a certificate provided the pleadings contain a legal description of land and there is a claim involving land.

2.06 Unless a certificate is registered in the land titles office, it will not be deemed notice of the action or proceeding to any person not a party to it. There is an exception to this general rule contained in s. 87(3) and it comprises mortgagees who have registered their interest prior to the registrant of a certificate of lis pendens and who wish to take sale or foreclosure

proceedings. These mortgagees may pursue sale or foreclosure proceedings notwithstanding that a certificate has been filed but only if they are not a party to the action or proceeding which is the subject of the certificate.[7]

2.07 Certificates of lis pendens may also issue from the County Courts. Although there is no legislation concerning lis pendens in "The County Courts Act", C.C.S.M. c. C260, case law has held that subsection 27(2) of that Act (which states that a County Court has "all the powers of the Court of Queen's Bench in any action within its jurisdiction") effectively empowers the County Courts to deal with certificates of lis pendens as provided for by "The Queen's Bench Act".[8] Section 55 of "The Builders' Liens Act", an Act over which the County Courts have jurisdiction, also allows the issuance of certificates of lis pendens. So does s. 20(1) of "The Marital Property Act", a statute for which the County Courts share jurisdiction with the Court of Queen's Bench.

2.08 The incidence of the issuance of certificates of lis pendens from the Queen's Bench and the County Courts has been steadily increasing. Statistics supplied to us by the Courts indicate that in 1976, 39 certificates were issued by these two section 96 trial courts; by 1981 that number had jumped to 104.

2.09 Once a certificate of lis pendens has been issued by a section 96 Court it may be filed with a District Registrar under the Torrens system of land registration in Manitoba in accordance with subsection 148(2) of "The Real Property Act", C.C.S.M. c. R30 (supra).

B. The scope of the actions for which a certificate may issue.

2.10 There is some discrepancy between "The Real Property Act" and "The Queen's Bench Act" as to the type of proceedings for which a certificate may issue. In Winnipeg Paint and Glass v. Lackman [9] the scope of what is now s. 148(2) of "The Real Property Act" was judicially interpreted. In that case, a creditor had sued a debtor and his wife on behalf of himself and all other creditors, to set aside an alleged conveyance of land from the debtor to his wife. The creditor had filed a certificate of lis pendens concurrently with his claim and the debtor applied to the Court for its vacation. Dysart, J. granted the application on the basis that s. 148(2) requires the registrant of

a certificate to claim an estate or interest in the land to which the certificate is filed sufficient to support a caveat. In the Court's view, an ordinary creditor, such as the respondent in this case, did not fulfil this requisite. To quote from a passage of the judgment:[10]

> The question here is whether the plaintiff, as a mere ordinary creditor of the former owner of land, seeking to set aside a transfer of that land because fraudulent as against creditors, can be said to have any estate or interest in the land in question as will entitle it to file a caveat, or to file "in lieu of. . a caveat, . . a certificate of lis pendens ". A fair construction of this section [s. 148(2)] would lead to the conclusion that the estate or interest referred to must be such as will support a caveat; this seems to be indicated by the words "in lieu of". It cannot successfully be argued that the creditor in this case has that kind of an estate or interest in his debtor's land.

2.11 Winnipeg Paint and Glass was decided before sections 87 and 88 of "The Queen's Bench Act" were enacted in 1931. It was generally on this basis that the Manitoba Court of Appeal distinguished it in a recent case, Penner's Construction Ltd. v. Ancel ,[11] when considering the scope of actions in which certificates may issue under "The Queen's Bench Act". On similar facts as Winnipeg Paint , the Court held that a certificate of lis pendens could issue from the Court of Queen's Bench where an action is commenced by an ordinary creditor to set aside a conveyance of land under "The Fraudulent Conveyances Act". C.C.S.M. c. F160. Such an action brings title to land into question and, according to the Court, is thus one of the types of proceedings contemplated by the language of s. 87(1).

2.12 The three judgments of the Justices of the Court of Appeal in Penner discuss the drafting differences between s.87(1) of "The Queen's Bench Act"and s. 148 (2) of "The Real Property Act". The Court interprets s. 87(1) more broadly than the interpretation given to s. 148(2) by Dysart, J. in Winnipeg Paint and Glass. The cases can be reconciled by interpreting s. 148(2) as requiring a registrant to claim personally an estate or interest in the land in question, whereas s. 87(1) only necessitates that a litigant questions some aspect of the title for a certificate to issue and whether (s)he is advancing a personal claim to an estate or interest in the land is irrelevant.

2.13 There is, in our opinion, no reason for the drafting differences

between these two provisions. There is also a potential problem in the different interpretations of these two subsections in that the court may issue a certificate which the district registrar, at least under a combined reading of s. 66(1) and s. 148(2) of "The Real Property Act", has the authority to reject for registration under the Torrens title system.[12] We have consulted Mr. M.M. Colquhoun, the Registrar General of Manitoba, on this point and he agrees that subsection 148(2) should be made uniform in scope with subsection 87(1) of "The Queen's Bench Act".

2.14 Subsection 148(2) also needs to be made uniform in scope with a provision in "The Marital Property Act", C.C.S.M. c. M45. That is, by virtue of the passage of Bill 15 during the last Session of the Legislature, an applicant under "The Marital Property Act" may apply to a section 96 Court to obtain an order for the issuance of a certificate of lis pendens notwithstanding that title or interest in land is not brought into question within the meaning of s. 87(1) of "The Queen's Bench Act".[13]

2.15 This legislative amendment arose following a decision of the Manitoba Court of Appeal in Pepping v.Baffsky [14] where it was held that an application under "The Marital Property Act" does not vest an applicant with an interest in the land of the respondent so as to allow the filing of a certificate. The legislative amendment was enacted to empower the Court to order a certificate where there is a risk that the respondent will abscond or dissipate the marital assets so that a certificate is required for their preservation.

2.16 Given the incongruity between s. 148(2) of "The Real Property Act" on the one hand, and s. 87(1) of "The Queen's Bench Act" and s. 20(1)(c) of "The Marital Property Act" on the other, we recommend:

RECOMMENDATION 1

That subsection 148(2) of "The Real Property Act" be amended so that the right to file a certificate of lis pendens with the district registrar arises whenever a certificate is issued by a court in Manitoba.

C. The form of the certificate

2.17 The form for the certificate of lis pendens is set forth in subsection 87(2) of "The Queen's Bench Act".[15] However, the form set out in s. 87(2) is not the one actually used by the Court of Queen's Bench. One of our respondents has informed us that should one follow the statutory form set out in the Act, it will not be accepted by the Court for issuance. The form actually used by the Queen's Bench is attached to this Report as Appendix C.

2.18 Although admittedly s. 87(2) is discretionary in approach, we think the legislation should reflect current practice. We think it preferable, to allow greater flexiblity, for the actual wording of the form to be set forth in the Queen's Bench Rules. Accordingly, we recommend:

RECOMMENDATION 2

That subsection 87(2) of "The Queen's Bench Act" be repealed and the Attorney-General consult with the judges of the Court of Queen's Bench on inserting the form of the certificate in the Queen's Bench Rules.

D. Certificates of lis pendens and the Torrens system

2.19 The Torrens system of title registration generally ensures that the land contained in a certificate of title is subject only to those rights and encumbrances which are set out on the title itself. Accordingly, when a certificate of lis pendens is filed under the new system, its registration is noted on the back of the certificate of title, as is generally the case with other encumbrances.

2.20 There are exceptions to this general rule, however, and these are the rights and encumbrances set forth in s. 57(1) of "The Real Property Act". This subsection comprises a list of matters to which a certificate of title is subject by implication and without special mention. Accordingly, a person who claims a right which is governed by this subsection generally need not register it to claim his or her interest. It is usually conceded that the integrity of

the Torrens system necessitates that this list comprise only those rights which, for some exceptional reason, are required to be preserved by implication.

2.21 Certificates of lis pendens have been included in this list since 1906.[16] Specifically, clause 57(1)(g) provides that certificates of title are by implication subject to "any certificate of lis pendens issued out of a court in the province and registered since the date of the certificate of title". Notwithstanding the fact that certificates of title are subject by implication to these certificates, as they are to caveats (see s. 57(1)(j)), both caveats and certificates of lis pendens can be filed and are noted on the back of a certificate of title, as is the case with other registrations not included in the s. 57(1) list.

2.22 We have considered recommending the repeal of clauses 57(1)(g) and (j) so that certificates of lis pendens and caveats would be removed from the list but have decided to refrain from doing so. The problems presented by s. 57and the Torrens system are generally under review by an inter-provincial committee on which the Commission is represented.

2.23 Having reviewed the present law pertaining to the form and scope of these certificates and their interrelationship with the Torrens system, we wish to address in the next Chapter the issue which was specifically referred to us for study: whether there should be a statutory cause of action to allow the recovery of damages for the "wrongful" filing of a certificate of lis pendens.

CHAPTER 3

SHOULD THERE BE A STATUTORY CAUSE OF ACTION FOR THE "WRONGFUL" REGISTRATION OF A CERTIFICATE?

A. The present law

3.01 No statutory cause of action exists in Manitoba for the recovery of damages where a certificate of lis pendens has been registered without a reasonable claim to title or interest in land. At common law, there has evolved a tort under the category of injurious falsehood known as slander of title.[17] However, it is unlikely that this may successfully be used as a cause of action for the "wrongful" filing of a certificate of lis pendens. First, it is an essential element of this common law tort that the falsehood be published with "malice". For malice to be proven, negligence or carelessness is not enough but rather it must be shown that the defendant actually knew the statement (in this case, the certificate) to be false. This is obviously a very difficult matter to prove. Second, however, there is the issue as to whether slander of title can even be raised as a possible cause of action for the "wrongful" filing of a certificate. In the Ontario Court of Appeal case of Tersigni v. Fagan [18] it was held that it cannot. The Court stated that, because a certificate of lis pendens is "a statement issued in and part of the process of the Court", it is "absolutely privileged"[19] and the registrant is accordingly immune from liability.

3.02 There has been no Manitoba jurisprudence on this point but certainly the Tersigni case is strong authority for the proposition that there can be no cause of action for damages flowing from the "wrongful" filing of a certificate of lis pendens, however malicious the intent. We therefore propose toreview whether there should be a statutory cause of action, and if so, its scope or breadth.

B. The principal question

3.03 We stated at the beginning of our Report that the effect of a certificate of lis pendens is to give notice to the whole world that the property against which a certificate is registered is the subject of a lawsuit. Its entire effect is similar to a caveat in that the latter is used "for the protection of alleged as well as of proved interests" and is "merely a warning which creates no new rights but protects existing rights, if any".[20] This therefore means that a person who wishes to deal with land against which a certificate is registered has the opportunity to examine the pleadings and disregard the certificate, if (s)he thinks the claim is baseless. In actual practice, however, a certificate acts as a cloud on the title, for purchasers and mortgagees are deterred from dealing with the land until the certificate is vacated ("set aside") and the relative rights and encumbrances are crystallized. In this manner, the certificate operates similarly to an ex parte injunction.

3.04 As is the case with caveators and the recipients of injunctions, certificates of lis pendens are highly advantageous to the registrant. Not only do they effectively protect any rights in the land in question but, as well, it has been said that they amount to "legal extortion" in that they can sometimes be employed to extract concessions from the owner/defendant.[21] They are certainly effective tools for "tying up" property during the course of litigation and, if a defendant is anxious to sell or encumber the property, we think it is probable (s)he will be more cooperative in accepting a compromise that might otherwise have been rejected.

3.05 Elsewhere, the Legislature and the courts have recognized that, when a document is registered or an order is issued prior to the final determination of rights, and that document or order results in a considerable constraint over the property of one of the parties, there should be some protection to ensure that that right is not abused. In particular, s. 146(1) of "The Real Property Act", C.C.S.M. c. R30, provides for a statutory cause of action where a caveat is filed or continued "wrongfully and without reasonable cause". So too "The Builders' Liens Act", C.C.S.M. c. B91, which generally makes a registrant of a lien liable in damages for a grossly exaggerated claim unless it was done "in

good faith and without negligence" (s. 40(1)). It is also well established that when a court issues a Mareva injunction, which directlyrestrains a litigant from disposing of his or her assets, the applicant must give an undertaking as to damages.[22]

3.06 The Ontario Legislature presumably recognized the analogy between certificates of lis pendens, on the one hand, and caveats, liens and injunctions, on the other, when it amended the Judicature Act in 1977 to provide for a statutory cause of action where a certificate of lis pendens has been wrongfully filed.[23] Subsections 38(4) and (5) of the Ontario legislation read as follows:

> (4) Any person who registers a certificate or caution referred to in subsection (1) without a reasonable claim to title to or interest in the land is liable for any damages sustained by any person as a result of its registration.
>
> (5) The liability for damages under subsection (4) and the amount thereof may be determined in an action commenced therefor in the court in which the certificate is issued or by application in the proceeding for an order to vacate the caution or certificate or in the action or proceeding in which the question of title to or interest in the land is determined.

3.07 We think, like the Ontario Legislature, that it is appropriate that there be a statutory cause of action for damages where a certificate has been filed wrongfully. We are concerned that there may be potential abuse given the broad ramifications flowing from the filing of a certificate and we are buttressed in our view by the exposure to liability where caveats and builders' liens are filed, and interlocutory ("not final") injunctions are issued, all of which are highly analogous in effect to these certificates.

3.08 The drafting of this legislation requires careful consideration. It cannot extend so broadly that it applies whenever a certificate is filed "without reasonable claim to title to or interest in land". This would result in exposure to liability where, for example, a creditor files a certificate in

an action similar to the Winnipeg Paint and Glass and Penner cases, as in this type of case a registrant is not claiming "title to or interest in the land". Rather (s)he is merely wishing to set aside a transaction as fraudulent so that the estate or interest in the land in question is available to enforce any claim or pending judgment. For this reason, we do not recommend the adoption of the language found in s. 38(4) of the Ontario Judicature Act (supra). Instead, we favour that the legislation be drafted similarly to s. 146(1) of "The Real Property Act" so that liability will arise whenever any person sustains damage as a result of a person registering a certificate of lis pendens "without reasonable cause". It is intended that this standard would expose those persons who commence actions frivolously for the purpose of "'hoisting a flag' on the land"[24] yet allow those who have a reasonable claim the right to ensure that it may, if successful, be enforced.

3.09 The Commission recommends:

RECOMMENDATION 3

That section 87 of "The Queen's Bench Act" be amended by adding the following subsection:

> Any person who registers a certificate of lis pendens without reasonable cause is liable for any damages sustained by any person as a result of its registration.

We think that it is important that the legislation extend the statutory cause of action to persons other than the owner of the property in question. The recommended draft subsection, like s. 146(1) of "The Real Property Act" and s. 40(1) of "The Builders' Liens Act" is worded so that this effect is achieved.

C. The appropriate proceedings in which to commence the statutory cause of action

3.10 Subsection 38(5) of the Ontario Judicature Act provides that

the liability for damages arising from the statutory cause of action and the amount thereof may be determined:

(1) by separate action commenced in the Court in which the certificate was filed;

(2) by application in the proceeding for an order to vacate the certificate; or

(3) in the action or proceeding in which the question of title to or interest in the land is determined.

3.11 We think that a similar provision should be added to s. 87 of "The Queen's Bench Act". However, in Manitoba, the Referee in Chambers is empowered by the Queen's Bench Rules to hear motions for the vacation of these certificates.[25] Due to the limitations imposed by s. 96 of the Constitution Act, 1867 [26] and other considerations, it would not be appropriate for the Referee to hear damage claims and, accordingly, the motion for the vacation of a certificate should not be included in the legislation as a proceeding in which the issues of liability and quantum may be determined. We accordingly recommend:

RECOMMENDATION 4

That the liability for damages under recommendation 3 and the amount thereof be determined in an action commenced in the court in which the certificate is issued or in the action or proceeding in which the question of title to or interest in the land is determined.

3.12 Before we conclude this Chapter, there is one matter of concern arising from section 88 of "The Queen's Bench Act" pertaining generally to the vacation of certificates of lis pendens which we wish to address briefly.

D. Vacation of certificates of lis pendens

3.13 Section 88 of "The Queen's Bench Act" provides for the vacation of certificates of lis pendens.[27] In effect, subsections 1 to 3 allow the interim vacation of certificates on the application of a party to the action where:

1. The plaintiff or other party at whose instance it was issued does not in good faith prosecute the action;

2. The plaintiff's claim is not solely specific performance of land (specific performance of land is a court order which compels a party to execute a specific conveyance of land); or

3. There is any other ground "which may be deemed just" (s. 88(3)).

3.14 Vacation orders have generally only been granted in Manitoba where the pleadings clearly indicate that title to or interest in land is not being brought into question with the result that the certificate should never have been issued.[28] The fact that vacation orders are difficult to obtain, however, is not due to the legislation; subsections 88(1), (2) and (3) give broadly based power to the court to vacate where it is deemed just, with or without the giving of security. The difficulty in obtaining a vacation order is, instead, due to the fact that the order may prevent a registrant from enforcing his or her claim if there is a transfer of title or interest in the particular land in question prior to any final judgment that is issued.

3.15 Presently a vacation order (with or without the giving of security) is the only interim remedy available in Manitoba to provide some relief against the potential abuse of the registration of certificates of lis pendens. The legislation pertaining to these certificates in British Columbia additionally empowers their court to order a plaintiff to enter into an undertaking to abide by any order that the court may make as to damages as a result of the registration of the certificate in question.[29] In enacting this provision, the legislators may have seen the similarity between certificates of lis pendens and Mareva and other interlocutory injunctions where an undertaking is

a condition of the order being granted.[30]

3.16 By an undertaking as to damages, the party obtaining the order in question undertakes to abide by any order as to damages which the court may make should it afterwards be of the opinion that the defendant has, by reason of the order, sustained any damages which such party ought to pay.[31] It has been held that an undertaking as to damages remains in force notwithstanding the dismissal or discontinuance of the action in question.[32] Should the party who obtains the order ultimately fail at the final disposition of his or her case, an inquiry as to damages sustained by reason of the order is generally conducted by the master of the court.[33]

3.17 We think that there should be a subsection added to s. 88 of "The Queen's Bench Act" to empower the court, as an alternative to the vacation of a certificate, to allow the retention of a certificate on the condition that the plaintiff enter into an undertaking to abide by any order that the court may make as to damages as a result of the registration of the certificate in question. This would give the court a power, in addition to the provision of a statutory cause of action, to provide for some relief for potential abuse of the registration of these certificates without the need to assess the merits of the case on an interlocutory application. An undertaking would be especially appropriate where the plaintiff claims only specific performance of land so that a vacation of a certificate would likely not be granted given that it would effectively preclude a plaintiff from successfully enforcing any final judgment (s)he obtains. However, we do not think that the power to order an undertaking should be confined to the situation where specific performance is solely claimed. Instead, the subsection should be drafted so that, like a vacation order, the court would be vested with the broad discretion to order an undertaking where it is deemed just.

3.18 As previously mentioned, undertakings are required when a Court issues a Mareva or other interlocutory injunction. There is also a provision in "The Real Property Act" by which a caveator may be required to give an undertaking as to damages in lieu of having the caveat lapsed.[34] The fact that these remedies are analogous to certificates of lis pendens we think supports our view that this would be a useful remedial provision to include in an

interlocutory motion to vacate a certificate. We recommend:

RECOMMENDATION 5

That section 88 of "The Queen's Bench Act" be amended by adding the following subsection:

> Where the court refuses to make an order vacating the registration of a certificate in an application under this section, it may require a party, as a condition of allowing the continuance of the registration of the certificate, to enter into an undertaking to abide by any order that the court may make as to damages as a result of the registration.

CHAPTER 4

SUMMARY OF RECOMMENDATIONS

Our recommendations in this Report may be summarized as follows:

1. That subsection 148(2) of "The Real Property Act" be amended so that the right to file a certificate of lis pendens with the district registrar applies whenever a certificate is issued by a court in Manitoba. (para.2.16)

2. That subsection 87(2) of "The Queen's Bench Act" be repealed and the Attorney-General consult with the judges of the Court of Queen's Bench on inserting the form of the certificate of lis pendens in the Queen's Bench Rules. (para. 2.17)

3. That section 87 of "The Queen's Bench Act" be amended by adding the following subsection:

> Any person who registers a certificate of lis pendens without reasonable cause is liable for any damages sustained by any person as a result of its registration. (para. 3.09)

4. That the liability for damages under recommendation 3 and the amount thereof be determined in an action commenced in the court in which the certificate is issued or in the action or proceeding in which the question of title to or interest in the land is determined. (para. 3.11)

5. That section 88 of "The Queen's Bench Act" be amended by adding the following subsection:

> Where the court refuses to make an order vacating the registration of a certificate in an application under this section, it may require a party, as a condition of allowing the continuance of the registration of the certificate, to

enter into an undertaking to abide by any order that the court may make as to damages as a result of the registration. (para. 3.18)

This is a Report pursuant to section 5(2) of "The Law Reform Commission Act", signed this 1st day of February, 1983.

Clifford H.C. Edwards, Chairman

Knox B. Foster, Commissioner

D. Trevor Anderson, Commissioner

George H. Lockwood, Commissioner

Richard Thompson, Commissioner

Geraldine MacNamara, Commissioner

M. Anne Riley, Commissioner

NOTES

1. For a good summary of certificates of lis pendens, see 13 C.E.D. at 90-100; also Di Castri, Law of Vendor and Purchaser (2nd ed.) at para. 481 ff.

2. Worsley v. The Earl of Scarborough (1746) 3 Atk. 391, 26 E.R. 1025.

3. Id. at 392, 1026.

4. See Judgments Act 1839 (Imp.) c. 11 s. 9.

5. See S.M. 1889 c. 16 s. 131.

6. S.M. 1931 c. 6 s. 86, 87.

7. See subsections 125(3) and (4) of "The Real Property Act", C.C.S.M. c. R30, for legislation concerning this principle.

8. See Ciecko v. Fotti unreported, Co. Ct. 58/78, Barkman, C.C.J. Normally, however, certificates of lis pendens will issue from the Court of Queen's Bench because the County Courts do not have jurisdiction to entertain actions for specific performance of contracts or the recovery of land: s. 27(3) of "The County Courts Act", C.C.S.M. c. C260.

9. [1923] 3 W.W.R. 361 (Man. K.B.).

10. Id. at 362.

11. (1979) 106 D.L.R. (3d) 634, [1980] 1 W.W.R. 698, 2 Man. R. (2d) 197 (C.A.); reversing [1979] 5 W.W.R. 178 (Q.B.).

12. S. 66(1) of "The Real Property Act"C.C.S.M. c. R30, reads as follows:

> 66(1) The district registrar may reject an instrument appearing to be unfit for registration or filing and shall not register or file an instrument purporting to transfer or otherwise deal with or affect land under the new system except in the manner herein provided for registration or

filing under the new system, nor unless the instrument is in accordance with the provisions of this Act, as applicable to the new system.

13. S.M. 1982 c. 17 s. 6; C.C.S.M. c. M45 s. 20(1)(c).

14. (1981) 130 D.L.R. (3d) 52; 12 Man. R. (2d) 173 (C.A.).

15. There is a separate form for certificates filed under "The Builders' Liens Act", C.C.S.M. c. B91; see Form 9 of that Act for a copy.

16. S.M. 1906 c. 75 s. 1.

17. See Salmond on Torts , 16th ed. at 405 ff; Fleming, The Law of Torts (5th ed.) at 695 ff; and see Captain Developments Ltd. v. Nu-West Group Ltd. (1982) 136 D.L.R. (3d) 502 (Ont. H.C.).

18. [1959] O.W.N. 94.

19. Ibid.

20. C.P.R. v. District Registrar (1956) 4 D.L.R. (2d) 518 (Man. Q.B.) at 521, per Tritchler, J.

21. See commentary of R.S. Harrison, Advocates' Quarterly, Vol. I at 238.

22. See D.T. Stockwood, "'Mareva' Injunctions" (1981) 3 Advocates' Quarterly 85; P.S.A. Lamek, "Equitable Remedies" in New Developments in the Law of Remedies , L.S.U.C. Special Lectures (1981) 125; R.M. Rogers, G.W. Hately, "Getting the Pre-trial Injunction" (1982), 60 Can. B. Rev. 1.

23. See S.O. 1977 c. 51, s. 4(1); R.S.O. 1980 c. 223 s. 38(4).

24. Supra n. 9 at 363, per Dysart, J.

25. See Queen's Bench Rules 182(e) and 183.

26. The provinces have the power to appoint court officers pursuant to s.92(14) of the Constitution Act, 1867 . However, a provincially appointed court officer, such as the Referee, is prevented by s. 96 of the Constitution Act, 1867 from exercising the powers of a judge of the superior, district or county court in each province. In light of this constitutional restriction, case law has held that a provincially appointed officer cannot assess damages other than for liquidated sums. See: SBI Management Ltd. v. 109014 Holdings Ltd. [1981] 5 W.W.R. 714 at 737, 22 C.P.C. 72, 32 A.R. 6 (C.A.); Lucy v. Interbuild Developments Ltd. (1974) 48 D.L.R. (3d) 150 (Alta. S.C.). As to the general power of a provincially appointed court officer see: A.G. Ont. v. Victoria Medical Bldg. Ltd. [1960] S.C.R. 32, 21 D.L.R. (2d) 97. See also Reference Re Residential Tenancies Act (1981) 123 D.L.R. (3d) 554 (S.C.C.) where Dickson, J., speaking for the Court, sets forth a three-step process in determining the constitutional validity of a power not exercised by a s. 96 judge.

27. Section 88 of "The Queen's Bench Act", C.C.S.M. c. C280, reads as follows:

> 88(1) Where a certificate is registered, and the plaintiff or other party at whose instance it was issued does not in good faith prosecute the action or proceeding, the court may at any time make an order vacating the registration of the certificate.
>
> 88(2) Where a certificate is registered, and the plaintiff's claim is not solely to recover land, or an estate or interest in land, but to recover money or money's worth, chargeable on or payable out of land, or some estate or interest in it, or for the payment of which he claims that the land or the estate or interest ought to be subjected, or where the plaintiff claims land or some estate or interest in land, and in the alternative, damages or compensation in money or money's worth, the court may, at any time, make an order vacating the registration of the certificate upon such terms as to giving security or otherwise as may be deemed just.
>
> 88(3) The court may, at any time, vacate the registration of a certificate upon any other ground which may be deemed just.
>
> 88(4) On an application under this section the court may order any of the parties to the application to pay the costs of any of the other parties to it, or may make any other

order with respect to costs, which under all the circumstances may be deemed just.

88(5) The order vacating the registration of a certificate may be registered on or after the fourteenth day from the date of the order, unless the order is meanwhile reversed or its registration is postponed or forbidden.

88(6) Where a certificate of lis pendens has been filed and the action or proceeding to which it relates
(a) has been discontinued; or
(b) has been dismissed or otherwise finally disposed of in so far as the land affected by the certificate is concerned, and
    (i) no appeal from the dismissal or disposal has been entered and the time limited for an appeal therefrom has expired; or
    (ii) the dismissal or disposal is entered by consent;
a certificate of the prothonotary or deputy clerk of the Crown and pleas setting forth the facts may be registered and when registered the certificate shall discharge and remove the lis pendens.

88(7) Where the registration of a certificate is vacated, any person may deal with the land as fully as if the certificate had not been registered, and it is not incumbent on any purchaser or mortgagee to inquire as to the allegations in the action or proceeding, and his rights are not affected by his being aware of the allegations.

28. See, for example, Sheridan v. Warkentin (1961) 42 W.W.R. 427 (Q.B.); app'd Ciecko v. Fotti supra n. 8.

29. Section 236 of the Land Titles Act R.S.B.C. 1979 c. 219 reads as follows:

236. (1) On the hearing of the application referred to in section 235, the court
(a) may order the cancellation of the registration of the certificate of lis pendens either in whole or in part, on
    (i) being satisfied that an order requiring security to be given is proper in the circumstances and that damages will provide adequate relief to the party in whose name the certificate of lis pendens has been registered; and
    (ii) the applicant giving to the party the security so ordered in an amount satisfactory to the court; or
(b) may refuse to order the cancellation of the registration, and in that case may order the party
    (i) to enter into an undertaking to abide by any order that the court may make as to damages properly payable to the owner as a result of the

registration of the certificate of lis pendens; and

(ii) to give security in an amount satisfactory to the court and conditioned on the fulfilment of the undertaking and compliance with further terms and conditions, if any, the court may consider proper.

(2) The form of the undertaking shall be settled by the registrar of the court.

(3) In fixing the amount of the security to be given, the court may take into consideration the probability of the party's success in the action in respect of which the certificate of lis pendens was registered.

30. Supra n. 22. And see: Halsbury's Laws of England (4th ed.) Vol. 24, paragraph 1072 ff.

31. Halsbury's , supra n. 30. For an example of where an undertaking as to damages has been required as a condition of retaining the registration of a certificate of lis pendens, see: Cloverlawn-Kobe Developments Ltd. v. Tsogas [1979] 6 W.W.R. 31 (B.C.S.C.). The appropriate wording of the undertaking in an interlocutory injunction is set forth in 22 Court Forms (2nd ed.) 91, Form 13.

32. Supra n. 30.

33. For an example of the form of an order for the inquiry into damages sustained by the wrongful granting of an injunction, see W.D. Williston, Precedents in Practice at 332.

34. Section 139(1) of "The Real Property Act" reads as follows:

139(1) Except in the case of a caveat filed by the district registrar, every caveat filed against any land, mortgage, encumbrance, or lease, may be disposed of by the district registrar as lapsed, upon the expiration of fourteen days after notice given by the district registrar to the caveator to take proceedings in the court on his caveat,

(a) unless, before the expiration of that period, the caveator appears before the court on motion in chambers or otherwise, and gives such undertaking or security, or lodges such sum in court, as the court considers sufficient to indemnify every person against damage that may be sustained by reason of a disposition of the property being delayed, and to answer the costs of the caveatee in the proceedings; or

(b) unless he has within that time filed with the district registrar evidence to the satisfaction of the district registrar of proceedings taken under his caveat as permitted by this Act.

APPENDIX A

AN ACT TO AMEND THE QUEEN'S BENCH ACT

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Manitoba, enacts as follows:

Subsec. 87(2) rep.

1. Subsection 87(2) of The Queen's Bench Act, being chapter C280 of the Revised Statutes, is repealed.

Subsec. 87(3) am.

2. Subsection 87(3) of the Act is renumbered as subsection 2.

Subsec. 87(3) added

3. The Act is amended by adding thereto, immediately after subsection 87(2) thereof, the following subsections:

Liability for certificate registered without reasonable cause

87(3) Any person who registers a certificate referred to in subsection (1) without reasonable cause is liable for any damages sustained by any person as a result of its registration.

Recovery of damages

87(4) The liability for damages under subsection (4) and the amount thereof may be determined in the action or proceeding in which the question of title to or interest in land is determined or in a separate action or proceeding.

Subsec. 88(3.1) added

4. The Act is amended by adding thereto, immediately after subsection 88(3) thereof, the following subsection:

Undertaking in lieu of vacating

87(3.1) Where the court refuses to make an order vacating the registration of a certificate in an application under this section, it may require a party, as a condition of allowing the continuance of the registration of the certificate, to enter into an undertaking to abide by any order that the court may make as to damages as a result of the registration.

Commencement of Act

5. This Act comes into force on the day it receives the royal assent.

APPENDIX B

AN ACT TO AMEND THE REAL PROPERTY ACT

HER MAJESTY, by and and with the advice and consent of the Legislative Assembly of Manitoba, enacts as follows:

Subsec. 148(2) rep. and sub.

1. Subsection 148(2) of The Real Property Act, being chapter R30 of the Revised Statutes, is repealed and the following subsection is substituted therefor:

Right to file certificate of lis pendens

148(2) A person who institutes a suit or proceeding in a court may, in lieu of or after filing a caveat, file a certificate of lis pendens, signed by the proper officer of the court in which the suit or proceeding has been instituted.

Commencement of Act

2. This Act comes into force on the day it receives the royal assent.

APPENDIX C

IN THE QUEEN'S BENCH

MANITOBA
EASTERN
JUDICIAL DISTRICT
TO WIT:

I certify that in a suit or proceeding in the Court of Queen's Bench

BETWEEN:

Plaintiff

— and —

Defendant

some title or interest is called in question in the following lands, that is to say:

And at the request of the said Plaintiff, this certificate is given for the purpose of registration, pursuant to the statute in such case made and provided.

Given under my hand, and the seal of the said Court, at the City of Winnipeg, this day of A. D. 19 .

DEPUTY PROTHONOTARY

AG-af-44

No.

QUEEN'S BENCH

PLAINTIFF

VS.

DEFENDANT

CERTIFICATE OF LIS PENDENS